88-1966

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

PATRICK M. ZILL,
Petitioner,

vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

THELMA C. FURRY
50 Munroe Falls Avenue
Munroe Falls, Ohio 44262
(216) 688-4047
Counsel of Record
for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTIONS PRESENTED

(a) Is there a denial of Due Process when the District Court concluded on Summary Judgment Motion without a hearing that Petitioner was an at-will employee, when the Rules of Respondent forbid termination at-will of its Avis-Non-Union Employees?

(b) Where employer acts in a dual capacity, as employer and as a labor relations person towards its Avis-Non-Union Employees as outlined in the Benefit's Manual, what duty does such employer owe its employee before termination of employment?

(c) Did the District Court and the District Court of Appeals err in failing to find that Petitioner was wrongfully discharged under Ohio Revised Code 4141.29 (D)(2), Ohio Law, and is Res Judicata applicable in this case?

(d) Did the District Court and the District Court of Appeals commit error in refusing to grant Petitioner leave to file an Amended Complaint to conform to the facts after discovery?

II.

LIST OF PARTIES

Patrick M. Zill,
Plaintiff-Appellant below.

Avis-Rent-A-Car Systems, Inc.
Defendant-Appellee below.

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No. _____

IN THE

United States Supreme Court

October Term, 1988

PATRICK M. ZILL,
Petitioner,

vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner, Patrick M. Zill, respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States District Court and the United States Court of Appeals, Sixth Circuit, entered in the above entitled proceeding March 7, 1989.

This appeal arises from a civil action for wrongful discharge on a summary judgment proceeding.

Jurisdiction of this Court is invoked under the provisions of Title 28 §1254.1.

OPINIONS BELOW

Opinion March 7, 1989 of the United States Court of Appeals for the Sixth Circuit is not recommended for publication.

Order June 28, 1988 by George C. Smith, United States District Judge.

Decision and Entry January 6, 1988 by George C. Smith, United States District Judge.

Order November 12, 1987 by James L. Graham, United States District Judge.

Order November 3, 1987 by James L. Graham, United States District Judge.

Ohio Bureau of Employment Services Determination of Benefits Claim for week ending March 31, 1984.

All Opinions Below will appear in the Appendix.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a civil action for wrongful discharge on summary judgment proceeding. The United States Court of Appeals, Sixth District, affirmed the judgment of the lower Court on March 7, 1989.

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254 (1).

Cases that sustain the jurisdiction of this Court include:

(1) *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 477 U.S. 242 (1986).

(2) *Birmingham Fire & Insurance Co. v. River Downs Race Track*, 260 Ohio App. 3d 139.

(3) *Hoover, et al. v. Sumlin, Randolph Township*, 12 Ohio St. 3d 1.

The denial of the right to a jury trial as provided for in the Constitution of the United States, is the ground on which we are seeking the help of the highest Court.

Rule 17(a) and Rule 17(2) are applicable in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Statement of the Grounds on which jurisdiction of this Court is invoked:

> Supreme Court Rule 17 states under what circumstances a Decision may be appealed: "The United States District Courts have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision."

Constitutional Provision, Statutes, Administrative Decisions:

> Constitution of the United States:
>
> Amendment XIV of the United States Constitution:
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State, wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Ohio Revised Code 4141.29:
>
> **4141.29 Eligibility and qualification for benefits**
>
> Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46 of the Revised Code.
>
> (A) No individual is entitled to a waiting period or benefits for any week unless he:

(1) Has filed a valid application for determination of benefit rights in accordance with section 4141.28 of the Revised Code;

(2) Has made a claim for benefits in accordance with section 4141.28 of the Revised Code;

(3) Has registered at an employment office or other registration place maintained or designated by the administrator of the bureau of employment services. Registration shall be made in person or in writing in accordance with the time limits, frequency, and manner prescribed by the administrator.

* * * * *

Federal Rules of Civil Procedure, Rule 15:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever may be the longer, unless the court otherwise orders.

* * * * *

STATEMENT OF THE CASE

On August 4, 1983 Petitioner entered into a contract with Respondent which contained provisions through Respondent's manual, wherein Petitioner would have job security, as an *Avis-Non-Union Employee.*

On March 17, 1984 Petitioner was fired by Respondent "on the spot", with no warning, in violation of the contract.

On or about March 19, 1984 Petitioner applied for unemployment compensation with the Ohio Bureau of Employment Services. The following determination was made: "Claimant was discharged by Avis-Rent-A-Car Systems, Inc. because the employer felt his job performance was unsatisfactory. No facts have been presented that would establish any misconduct or neglect on the part of the claimant to have caused the separation. Within the meaning of the law, claimant is not subject to any disqualification resulting from this discharge. Claim for week ending March 31, 1984 is allowed."

Though the contract provided for Avis-Non-Union Employees strict termination of employment rules, which provided for oral warnings, written warnings, and appearances before the body which decided upon termination of employment, Respondent summarily breached the contract and failed to act in its dual capacity as a Non-Union Mediator and employer.

On March 28, 1984, after the firing of Petitioner, Respondent mailed a letter purported to be a warning, which was 6 days after Petitioner was fired.

On March 15, 1985 Complaint was filed in Franklin County Court of Common Pleas, Case Number 85-C-2-03-1469, endorsed thereon Jury Demanded, Action in Wrongful Discharge.

On March 22, 1985 Respondent filed its notice and petition for removal of the action to the United States District Court for the Southern District of Ohio under 28 U.S.C. 1331 Labor Dispute. On May 9, 1985 action was transferred.

On May 17, 1985 answer by Respondent was filed denying the pertinent allegations in the complaint. On October 22, 1987 Respondent filed its motion for summary judgment. Federal question was raised at the time motion for summary judgment was filed.

The case was assigned to Judge James Graham, in the court of first instance who denied motion for summary judgment.

On November 12, 1987 Respondent filed its memorandum to vacate Judge Graham's decision.

On December 11, 1987 notice was given this case was transferred to Judge George Smith.

January 4, 1988 Petitioner filed a motion to amend the complaint to conform with new evidence through discovery to wit: The reason for firing was because of old age.

February 18, 1988 Respondent filed its motion to reconsider the decision rendered by Judge James Graham on the dismissal of the motion for summary judgment.

February 29, 1988 Petitioner filed his memorandum contra the motion to reconsider Judge James Graham's decision.

June 6, 1988 motion to amend complaint overruled by Judge George Smith.

June 6, 1988 Appellant's memorandum contra dismissal of case.

June 28, 1988 Judge George Smith sustained Respondent's motion, vacated Judge James Graham's decision, and dismissed the case.

July 8, 1988 motion to reconsider dismissal, was not ruled on.

United States District Court of Appeals rendered an opinion affirming judgment of the District Court March 7, 1989.

The basis for Federal Jurisdiction is the Denial of Due Process, commencing in the court of first instance through the Court of Appeals.

Basis for Federal Jurisdiction in the Court of First Instance

Basis for Federal Jurisdiction in the Court of First Instance was invoked under diversity of citizenship—Labor Dispute 28 U.S.C. 1331 (b).

ARGUMENT OF REASONS FOR GRANTING THE WRIT

I. There is a denial of the Due Process when the District Court ruled on Summary Judgment Motion without a hearing and decided that Petitioner was an at-will employee.

The Court could not have arrived at the conclusion that Petitioner was an at-will employee if the Court's decision was made on the facts in the case, which includes the pleadings, the memoranda contra motion for summary judgment, answers to interrogatories, affidavits of Robert Schmidt and Appellant, depositions, joint Appellee's Exhibit B, being *Avis Employee's Manual*, Appellee's Joint Exhibit A, Plaintiff's Exhibit 2.

In response to Respondent's newspaper advertisement, Appellant's Exhibit 7, Petitioner was interviewed by Respondent's agent as shown in Petitioner's supplemental affidavit filed March 8, 1988. Petitioner when asked by Respondent's agent why he wanted to work for Respondent, stated "I want a job with Avis because it is a protected job; the advertisement attracted me as it offered a pension plan, hospitalization, and you will become a vested employee, and on this job, you just can't be hired and fired". Respondent's agent told Petitioner that he would not earn anymore than "$25,000.00 a year with Avis". Petitioner stated that "he wanted security, a protected job, and all the benefits" which were more important to Petitioner than "higher wages".

Petitioner accepted the offer made by Respondent and signed the "Sign-On" page, whereby he became an Avis Non-Union Employee, as outlined in the employee's manual.

To support the fact that Petitioner was denied his Constitutional rights and Rule 17.2 of the Rules of the Supreme Court of the United States as amended:

> "17.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

Also, Rule 17 (a):

> ". . . . .or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

We urge the Court to examine the interplay between the two opinions which agreed upon sustaining the motion for summary judgment. The decisions do not conform to the facts in the case before this Court.

We urge the Court to examine the decision and order of Judge James Graham which were overruled by Judge George Smith. The Court of Appeals affirmed the lower Court by stating that the lower Court did not abuse its discretion in sustaining the motion for summary judgment; but neither decisions of Judge Smith's and the Court of Appeals were based on the facts in the case before this Court.

To show that the motion for summary judgment should not have been sustained we call the Court's attention to *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (1986):

> ". . . . .It is clear enough from our recent cases that at the summary judgment stage the Judge's function is not himself to weight the evidence and

> determine the truth of the matter but to determine whether there is a genuine issue for trial."

There are many cases cited in the *Anderson* case, but the best analysis of the *Anderson* case is found in Justice Brennan's and Justice Rehnquist's dissenting opinions have made a very good analysis of *Anderson v. Liberty Lobby* judgment.

Judge George Smith used the following sentence from *Anderson v. Liberty Lobby*:

> "The Supreme Court concluded in Anderson that a judge considering a motion for summary judgment must 'ask himself not whether he thinks the evidence unmistakenly favors one side or the other, but whether a fair-minded jury could return a verdict for the Plaintiff on the evidence presented."

But the fact remains *Anderson v. Liberty Lobby* states:

> "In relying on a motion for summary judgment, the Court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponents are indulgently treated."

The pleadings in Petitioner's case were not looked upon at all; they were ignored.

For the reason above, we urge the Court to consider Rule 17 (a) and amendment 17.2.

A. When the employer extends itself in a dual capacity towards its employee it has a duty to perform as mediator.

Respondent failed in its role as a mediator towards Petitioner by completely ignoring its Rules and Regulations in matters of termination. The Exhibit

marked Number 2 states *"Avis-Non-Union-Employees"*. There is a contract between Petitioner and Respondent. Ohio Bureau of Employment Services ruled that Petitioner was wrongfully discharged.

Ohio Courts are holding that a ruling by the Ohio Bureau of Employment Services when there is a failure to appeal is Res Judicata.

Judge Graham based his decision to dismiss the motion for summary judgment on the authority of *Scheuer v. Rhodes,* 416 U.S. 232, 40 L. Ed. 3d 90.

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claim."

Rule 37 was construed by the Supreme Court of the United States prior to its latest amendment. Part of Mr. Justice Harlan's opinion is as follows:

Societe Internationale v. Rogers, 357 U.S. 197

> "The provisions of Rule 37 which are here involved must be read in the light of the provisions of the Fifth Amendment that no person, shall be deprived of property without due process of law, and more particularly against the opinions of this Court which establish that there are constitutional limitations upon the power of Courts, even in aid of their own processes, To dismiss an action without affording a party the opportunity for hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations."

II. The District Court erred in failing to find that Petitioner was wrongfully discharged, and that in the absence of an appeal from the decision of the Ohio Bureau of Employment Service, the decision is Res Judicata.

The Courts should have considered that the Ohio Bureau of Employment Services determined that Petitioner was wrongfully discharged. The decision was not appealed by Respondent. The fact that he was wrongfully discharged should have been considered by the Court, in the absence of an appeal from the decision of the Ohio Bureau of Employment Services.

III. The District Court committed error prejudicial to Petitioner in refusing to grant Petitioner leave to file an amended complaint.

The Court committed error in denying Petitioner the right to amend the complaint in order to conform to the facts from the depositions and affidavits that Appellant was fired because he was too old. That the claim for $3,090. for earned commissions was overlooked through inadvertence when the Complaint was filed. Not to grant an amendment would amount to unjust enrichment. A motion for leave to amend a pleading made pursuant to Civil Rule 15(A) should be granted freely when justice so requires.

The District Court committed error in denying Appellant the right to amend the complaint to conform to the facts found in the depositions. Civil Rule 15(A) was intended to be liberal in granting litigants, in the interests of justice, the right to amend pleadings.

Birmingham Fire and Insurance Co. v. River Downs Race Track (1985), 26 Ohio App. 3d 139

"Civ. R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party."

Hoover et al., Appellants v. Sumlin, Randolph Township Appellee, et al. (1984), 12 Ohio St. 3d 1

"1. A motion for leave to amend a pleading made pursuant to Civ. R. 15(A) should be granted 'freely' when justice so requires."

It was necessary to amend the complaint in order to show under what circumstances Appellant was wrongfully discharged. Under what circumstances Appellant is due the sum of $3,090.00 for commissions earned, was also brought out in the amended complaint.

The District Court in the dismissal of the motion to amend stated that another suit should be filed in order to recover the $3,090.00 from Appellee. It is our position that if another suit were brought in to recover the sums due for commissions, Appellee could well raise the question of Res Judicata as a defense.

IV. The District Court and the Court of Appeals erred in failing to find that Petitioner was wrongfully discharged under Ohio Revised Code 4141.29 (D)(2), Ohio Law and Res Judicata is applicable in this case.

The Ohio Courts have been holding that determinations by the Ohio Bureau of Employment Services if not appealed may be preclusive.

We urge the Court to certify the writ in this case to make a determination on the points involved in this case.

CONCLUSION

There is a denial of due process in this case. We urge the Court to certify the Writ of Certiorari in order to re-examine the controversy between the different opinions and facts in this case.

There are too many persons in our country who are deprived of their constitutional rights by means of summary judgment process. The under-privileged may obtain help from various organizations and agencies; however, the common worker cannot litigate his case due to their lack of funds. Judges should be discouraged from disposing of cases at the summary stage.

In the interest of justice, we urge the Court to examine this case. Although it was a very short proceeding, a very substantial right is involved, as set out in the dissenting opinions of Justice Brennan and Justice Rehnquist in *Anderson v. Liberty Lobby, Inc., supra.*

Deprivation of inalienable rights, which are granted under the Constitution, is inexcusable, and should not be permitted by any Court.

This case involves a substantial constitutional question, and is of public and great general interest.

Respectfully submitted,

THELMA C. FURRY
50 Munroe Falls Avenue
Munroe Falls, Ohio 44262
(216) 688-4047
Attorney for Plaintiff-Appellant

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 7, 1989)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 88-3686

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICK M. ZILL,
Plaintiff-Appellant,

v.

AVIS RENT A CAR SYSTEM, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: MARTIN and RYAN, *Circuit Judges*, and POTTER*, *District Judge.*

PER CURIAM. This is an appeal of a wrongful discharge case. Patrick M. Zill was hired by Avis Rent A Car System, Inc. on August 5, 1983 and after repeated warnings was fired on March 26, 1984 for failure to properly record the transactions which were required in

* The Honorable John W. Potter, United States District Court Judge for the Northern District of Ohio, sitting by designation.

his job. He sued Avis in state court and the case was removed to federal court where summary judgment was granted. We affirm.

Zill was employed under an oral at will agreement by Avis as a used car salesman in its Columbus, Ohio sales location. In this job he was required to complete a number of forms for each car that he sold. They included a buyer's order, a bill of sale, a data base form and a warranty application. Zill testified in a deposition taken before trial that he understood his responsibilities and knew that the proper completion of these forms was a part of his job. He also acknowledged that he had failed to complete these forms or had filled them out incompletely on a number of occasions. Prior to his discharge he was given at least two verbal warnings and a written warning regarding his failure to fill out the forms properly.

In granting the summary judgment the district court found that under no set of facts could Zill be, under Ohio law, anything other than an employee at will, subject to discharge at the discretion of his employer. See *Mers v. Dispatch Co.*, 19 Ohio St. 3d 100 (1985). Zill argues here that the employee handbook and the oral comments of Avis' agent created an enforceable binding employment contract. Zill offered and we can see no evidence of a meeting of the minds as to the creation of an employment contract. Thus we see no error in granting summary judgment.

Zill also argues that it was an abuse of the trial court's discretion to deny his motion to amend his complaint so as to allege a claim for past due commissions. We see no abuse in that the motion was filed after discovery was complete and just prior to a scheduled trial.

The judgment of the district court is affirmed.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 28, 1988)

Case No. C2-85-691

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT A CAR SYSTEM, INC.,
Defendant.

OPINION AND ORDER

This matter is before the Court pursuant to a motion to reconsider defendant's motion for summary judgment. A motion for reconsideration of summary judgment order is treated as a motion to alter or amend judgment under Fed. R. of Civ. P. 59(e), and is within the informed discretion of the trial court. *Huff v. Metropolitan Life Insurance Co.*, 675 F.2d 119 (6th Cir. 1982). After careful consideration of the fact that the motion for summary judgment was denied originally because discovery was not complete, and discovery has now been completed, the motion for reconsideration of summary judgment is SUSTAINED. Furthermore, plaintiffs have requested oral arguments on the motion. The Court does not believe oral arguments to be necessary and the requests are therefore DENIED.

On or about August 4, 1983 plaintiff, Patrick Zill, was hired by defendant, Avis Rent-A-Car System, Inc., as a used car salesman. Plaintiff was hired pursuant to an oral employment contract for an indefinite period. On or about March 26, 1984, plaintiff was discharged for alleged improper paperwork. Plaintiff brought this action for wrongful termination seeking compensatory and punitive damages.

In considering defendant's motion for summary judgment, the Court is mindful that summary judgment is appropriate only in limited circumstances. Rule 56(c) of the Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is ENTITLED to judgment as a matter of law.

The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The Supreme Court has held, however, that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50(a)], which is that the trial judge must direct a verdict, if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, _____, (1986), (citing *Brady v. Southern Co.*, 320 U.S. 476, 479-80 (1943)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Thus, the Supreme Court concluded in *Anderson* that a judge considering a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakenly favors one side or the

other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 477 U.S. at _____.

In this case, having considered at length the motion, memorandum contra, affidavits and depositions filed by all parties in support thereof and contra thereto, the Court does not believe that a fair-minded jury could return a verdict for the plaintiff. Rather, the Court believes that the defendants are entitled to summary judgment.

The determinative issue in this case is whether the plaintiff's employment with the defendant was an at-will employment which could be terminated without reason. The jurisdiction of this Court is based upon 28 U.S.C. §1332, diversity of citizenship. In a case before a federal court based on diversity, the Court is bound to follow the applicable state law as interpreted by the state's highest court or all available data if the state's highest court has not spoken on the issue. *Bailey v. V & O Press Co., Inc.*, 770 F.2d 601 (6th Cir. 1985). Under Ohio law, an employment contract in which the employee provides no other consideration in addition to the services incident to employment, the employee is considered an employee-at-will. *Turner v. SPS Technologies, Inc.*, No. 59145, Slip op. (Ohio Ct. App. June 4, 1987). The plaintiff, Zill, would be considered an employee-at-will.

Oral employment at-will contracts may be terminated for any or no reason as long as the reason, if there is one, is not prohibited by law unless a prior agreement has been reached. *MERS v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1985). Therefore, plaintiff, being an employee-at-will could be terminated without reason. There are two exceptions to this rule. The first exception is that an implied contract, demonstrated by

custom, company policy, or handbooks, may modify the at-will status. *Turner v. SPS Technologies, Inc.,* No. 51945, Slip Op. (Ohio Ct. App. June 4, 1987). The *Turner* Court continued saying that in order for there to be an implied contract modifying the at-will status there must be a meeting of the minds, not merely a unilateral policy statement. Clearly, there is not an implied employment contract between the plaintiff and the defendant that would alter the plaintiff's status as an at-will employee. The handbook given to and relied upon by the plaintiff to furnish an implied contract is clearly worded as guidelines, and therefore, are merely unilateral policy statements. Hence, the first exception is not applicable here.

The second exception to the rule is promissory estoppel. In order for the doctrine of promissory estoppel to apply four elements must be present: (1) there must be a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and, (4) the party claiming estoppel must be injured by the reliance. *Turner v. SPS Technologies, Inc.* However, between the plaintiff and defendant the first element of an unambiguous and clear promise is not present. As shown in the preceding paragraphs, the policy manuals do not serve as promise to modify the termination procedure. Therefore, since the first requirement is not met, and the other elements will fall with it, the doctrine of promissory estoppel will not serve as a modification of the at-will status of the employment contract.

In conclusion, plaintiff Zill's employment with defendant Avis Rent-A-Car System is an at-will employment which can be terminated for any or no reason by either party. Moreover, the plaintiff cannot modify his status of an at-will employee by either of the available exceptions. Therefore, the defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/ GEORGE C. SMITH
United States District Judge

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed January 6, 1988)

Case No. C-2-85-691

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT-A-CAR SYSTEM, INC.,
Defendant.

DECISION AND ENTRY

A motion to amend complaint having come before this Court, this Court determines that:

1. The claim for commissions could have been raised initially in the case. At the present time the trial is less than a month away and discovery has been completed.

2. The claim to be added has nothing to do with the wrongful discharge claim.

3. The plaintiff can obtain relief for this claim in an alternate forum.

For these reasons, it is ordered that plaintiff's motion to amend complaint is DENIED.

IT IS SO ORDERED.

/s/ GEORGE C. SMITH
United States District Judge

ORDER OF THE UNITED STATES DISTRICT JUDGE

(Filed November 12, 1987)

Case No. C-2-85-691

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT-A-CAR,
Defendant.

ORDER

Defendant's motion for summary judgment was heard on November 12, 1987 and for the reasons stated on the record at the conclusion of the hearing the motion was DENIED.

The Court upon its own motion reopened discovery in this matter, discovery shall be completed on or before December 31, 1987. This matter will be scheduled for another final pretrial conference and for trial early in 1988.

It is so ORDERED.

/s/ JAMES L. GRAHAM
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 3, 1987)

Case No. C2-85-691

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK M. ZILL,
Plaintiff,

v.

AVIS RENT-A-CAR SYSTEM, INC.,
Defendant.

ORDER

At the final pretrial conference held in this matter on October 22, 1987, plaintiff requested and was granted leave to take the deposition of the person in control of the plaintiff's personnel file on or before October 30, 1987. Counsel reported that otherwise discovery was complete. Counsel were directed to confer and finalize the final pretrial order in this matter. On October 27, 1987, plaintiff filed a request to supplement the final pretrial order to correspond with plaintiff's request made on the 22nd day of October, 1987. In the memorandum in support of this motion, plaintiff's counsel indicates that she desires to have the pretrial order amended to reflect leave to take the deposition of defendant's custodian of employment records and to take the deposition of two plaintiff's witnesses. There was no request for taking the

depositions of two plaintiff's witnesses at the final pretrial conference. On October 28, 1987, defense counsel hand delivered to the Court the final pretrial order signed by both counsel which, under Section VIII states:

> Plaintiff is granted leave to take the deposition of a representative of defendant who is custodian of plaintiff's employment records and all employee manuals relating to benefits on or before October 30, 1987.

The Court notes that in a preliminary pretrial order filed herein on July 26, 1985, Magistrate Abel ordered that all discovery must be completed by November 30, 1985. In light of all of the above, it is difficult for this Court to understand why counsel have not completed the taking of all depositions long before this date. Nevertheless, in the interests of justice, plaintiff's request for leave to take the depositions of two plaintiff's witnesses is GRANTED. Those depositions must be completed and filed on or before November 11, 1987.

Accordingly, plaintiff's motion to supplement final pretrial order is GRANTED on the terms set forth above.

On October 29, 1987, plaintiff filed a motion to compel discovery. In this motion, plaintiff contends that the witness who appeared in response to plaintiff's deposition notice was not aware of any "manuals or the national policy of the company." The Court notes that at the time of the final pretrial conference, plaintiff requested the deposition of the person in control of the plaintiff's personnel file. However, in the final pretrial order delivered to the Court on October 28, 1987, counsel provided that the deponent in question would also be the custodian of "all employee manuals relating to benefits."

Defendant reports that the witness appeared and testified that there was no employee manual relating to benefits. The motion to compel is DENIED.

On November 2, 1987, plaintiff filed a motion requesting the Court to continue the trial date of November 17, 1987. The motion is DENIED and this action will proceed to trial on November 17, 1987.

Plaintiff's counsel is specifically alerted to the fact that defendant filed its motion for summary judgment herein on October 22, 1987 and that this motion is scheduled for oral hearing on November 12, 1987 at 8:30 a.m. Plaintiff's counsel must complete discovery and file her response to the motion for summary judgment on or before November 11, 1987.

It is so ORDERED.

/s/ JAMES L. GRAHAM
United States District Judge

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT:

This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. CLAIMANT'S NAME AND ADDRESS
   Patrick M. Zill
   168 Karney Place
   Gahanna, Ohio 43230

2. EMPLOYER'S NAME AND ADDRESS
   Avis Rent-A-Car Systems, Inc.
   R.E. Harrington, Inc.
   P.O. Box 1160
   Columbus, Ohio 43216

3. Local Office Number
   174-1

4. Social Security Account Number
   287-18-6527

5. Benefit Year Began
   3-25-84

6. Date Mailed
   APR 11 '84

7. THIS NOTICE IS A DETERMINATION OF:
   - [x] (a) First weekly claim
   - [ ] (b) Additional (reopened) weekly claim
   - [ ] (c) Continued weekly claim
   - [ ] (d) Other. See decision in item 8

8. REASON FOR SEPARATION:
   [ ] lack of work [x] see item 8D.
   Claim for week ending 3-31-84, is:

   A. [ ] ALLOWED

B. DISALLOWED—
Claimant's deductible income and/or earnings for the week identified above equalled or exceeded the weekly benefit amount.

C. [ ] DISALLOWED—
Claimant has not met requirements for removing a prior suspension of benefits.

D. [x] DISCHARGE
Section 4141.29(D)(2)(a) Ohio Law
Claimant was discharged by Avis Rent-A-Car Sys., Inc. because the employer felt his job performance was unsatisfactory. No facts have been presented that would establish any misconduct or neglect on the part of the claimant to have caused the separation. Within the meaning of the law, claimant is not subject to any disqualification resulting from this discharge. Claim for week ending 3-31-84 is allowed.

APPEAL RIGHTS: If you think this determination is incorrect as to fact or law, or if you have additional facts which might affect the determination, you may file a request for reconsideration in person at any bureau office. You will be given assistance in preparing your written request. If you desire, you may write directly to the local office in which the claim is filed. To be considered timely, your request must be filed in person or postmarked no later than fourteen calendar days after the date entered in item 6 on this form. If the fourteenth day falls on a legal holiday, the period for filing is extended to include the next scheduled workday. If the request is filed by mail, it should indicate the items with which you disagree, the reason for disagreement, and the social security account number shown in item 4 on this form.

No. 88-1966

FILED
JUN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PATRICK M. ZILL,
Petitioner,

vs.

AVIS RENT-A-CAR SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT AVIS RENT-A-CAR SYSTEM, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. ROSENBERG
Counsel of Record
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF
1100 Citizens Building
Cleveland, Ohio 44114
(216) 363-4500

Attorney for Respondent
Avis Rent-A-Car System, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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No. 88-1966

IN THE

Supreme Court of the United States

October Term, 1988

PATRICK M. ZILL,
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AVIS RENT-A-CAR SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT AVIS RENT-A-CAR SYSTEM, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner filed suit in the Common Pleas Court for Franklin County (Columbus), Ohio and Respondent removed the action to the United States District Court for the Southern District of Ohio. Thereafter, after discovery was completed, Respondent filed a Motion for Summary Judgment on a number of grounds including that Petitioner was "an employee at-will" and therefore could be terminated by Respondent for any reason provided Respondent did not violate the law. The District Court granted the Motion for Summary Judgment finding that Petitioner was "an employee at-will".

Petitioner thereupon filed an appeal with the U.S. Court of Appeals for the Sixth Circuit and, after briefs were filed and oral argument held, the Court of Appeals affirmed the Summary Judgment granted by the District Court. It is from this affirmance by the Court of Appeals that Petitioner has filed the instant Petition for Writ of Certiorari.

ARGUMENT

I. THERE WAS NO DENIAL OF DUE PROCESS WHEN THE DISTRICT COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WITHOUT A HEARING BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER AS A MATTER OF LAW PETITIONER WAS AN EMPLOYEE AT-WILL AND WAS PROPERLY DISCHARGED FOR FAILING TO OBEY THE RULES AND REGULATIONS OF HIS EMPLOYMENT.

A. This Court Has Recently Stated That Summary Judgment Is a Favored Procedure Where a Party With The Burden of Proof Cannot Produce Evidence That Would Withstand a Directed Verdict.

The purpose of summary judgment under Rule 56 of the Federal Rules of Civil Procedure is to avoid an unnecessary trial when there are no issues of material fact. *Chore-Time Equipment, Inc. v. Cumberland Corp.*, 713 F.2d 774, 779 (Fed. Cir. 1983). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules", which as a whole are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2555 (1986) quoting Fed. R. Civ. P. 1.

The standard for determining whether to grant summary judgment is clear from the language of Rule 56(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Although the moving party has the initial burden of showing an absence of an issue of material fact:

> . . . [r]ule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2514 (1986).

In *Anderson*, the Supreme Court stated that the standard for summary judgment "mirrors" that for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Id.* at 2511. The court held that "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 2512. In other words, the proof offered in opposition to a motion for summary judgment must be sufficient to meet the standard of proof which would be required to sustain a verdict after trial.

B. The District Court Properly Granted Summary Judgment in Favor of Respondent.

The District Court reviewed the relevant pleadings, discovery materials, and affidavits and properly determined that there was an absence of a genuine issue of material fact and that a fair-minded jury could not return a verdict for Petitioner (Judgment Entry of June 28, 1988, p. 3, See Appendix A3 to Petition for Writ of Certiorari).

The District Court correctly found that Petitioner was an employee-at-will and he could be discharged at any time for any reason not prohibited by law or for no reason at all. *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1984). After carefully reviewing the evidence presented, the District Court concluded:

> (Petitioner's) employment with (Respondent) is an at-will employment which can be terminated for any or no reason by either party. Moreover, (Petitioner) cannot modify his status of an at-will employee by either of the available exceptions.

(Judgment Entry of June 28, 1988, p. 5, See Appendix A3 to Petition for Writ of Certiorari).

It is well-settled in Ohio that, unless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for no reason or any reason not contrary to law. *Id.* Ohio courts have made clear that a policy manual or handbook that is merely suggestive or which simply sets forth guidelines, cannot rise to the level of a contractual limitation on the right to discharge an at-will employee. *Davis v. Edwin Shaw Hospital*, Case No. 12365 (Summit County (Ohio) Court of Appeals, May 14, 1986) (unreported) and *Czerkas v. United States Steel Corp.*, Case No. 3823 (Lorain County (Ohio) Court of Appeals, November 13, 1985) (unreported). Moreover, to the extent that statements contained in a policy manual or handbook constitute unilateral policy statements, they have no contractual effect. *Turner v. SPS Technologies, Inc.*, Case No. 51954 (Cuyahoga County Court of Appeals, June 4, 1987) (unreported). Accordingly, the District Court correctly granted summary judgment in favor of Respondent.

C. The Granting of Summary Judgment in Favor of Respondent Without a Hearing Was Not a Denial of Due Process.

It is not a denial of due process for a trial court to grant summary judgment without providing a hearing to the parties. See, for example, *Dayco Corporation v. Goodyear Tire and Rubber Company*, 523 F.2d 389 (6th Cir. 1975) wherein the Court of Appeals held that it is discretionary for the trial court to grant an oral argument "on application and proper showing". In the case at bar, Petitioner did not request oral argument.[1] See also *Sarelas v. Porikos*, 320 F.2d 827 (7th Cir. 1963) wherein the Court stated:

> "There is no merit to the contention that the District Court denied Plaintiff due process or equal protection of the law so as to render the District Court judgment void."

Accordingly, there was no error in the District Court or Court of Appeals on this issue.

---

[1] Rule 4.0.4 of the Rules of the U.S. District Court for the Southern District of Ohio provided that "On any motion for summary judgment, a party will be deemed to have waived a hearing on the motion unless a request for hearing is filed within ten (10) days of the time of filing or the expiration of time for filing a memorandum in opposition to the motion."

D. This Court Should Not Review the Allegation That Respondent "Extend(ed) Itself in a Dual Capacity Towards (Petitioner And) Ha(d) a Duty to Perform as Mediator" Because Petitioner Raised That Issue For the First Time in This Petition For Writ of Certiorari.

The Supreme Court should not be asked to rule upon an issue in an appeal which was never before raised in the District Court or Court of Appeals. This has been the rule of this Court for many years. See *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220 (1927) and *Miree v. DeKalb County, Ga.*, 97 S. Ct. 2490, 433 U.S. 25 (1977) wherein this Court declared that where an issue has not been pleaded, argued or briefed either in federal district court or in Court of Appeals it would not be considered by the United States Supreme Court on a grant of certiorari. See also *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936) and *Urie v. Thompson*, 69 S. Ct. 1018 (1949) for similar holdings. This "issue" never having been raised in any court below, Petitioner should not be permitted to raise it at this time.

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT PETITIONER WAS NOT WRONGFULLY DISCHARGED NOTWITHSTANDING THE FACT THAT RESPONDENT DID NOT APPEAL FROM THE DECISION OF THE OHIO BUREAU OF EMPLOYMENT SERVICES ("OBES"). THE DECISION OF THE OBES WAS NOT *RES JUDICATA.*

The findings of the Ohio Bureau of Employment Services ("OBES") regarding just cause for discharge did not bind the District Court in the wrongful discharge action because the issues before the District Court and the OBES were not the same. *Distelzweig v. Hawkes Hospital of Mount Carmel,* 34 Ohio App. 3d 277 (1986) and *Cooper v. City of North Olmsted,* 795 F.2d 1265 (6th Cir. 1986). The District Court properly ignored the OBES finding concerning "just cause" in light of the fact that Respondent did not need "just cause" to discharge Petitioner. Thus, the OBES findings, determined in a non-adversarial forum, were irrelevant.

The issue raised in the OBES proceeding—whether there was "just cause" to terminate Petitioner's employment—was not part of the trial court proceeding because Respondent could terminate Petitioner "for any reason which is not contrary to law". *Mers, supra,* at 103. Moreover, the OBES finding was not "judicially affirmed" and was non-adversarial in nature, no hearing having taken place. Respondent did not oppose Petitioner's attempt to obtain benefits through OBES, and therefore, the OBES decision did not preclude summary judgment.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S MOTION TO AMEND HIS COMPLAINT.

Almost three years after filing his original Complaint, and shortly before the scheduled trial date, Petitioner filed a Motion for Leave to Amend his Complaint to add an additional claim for alleged past due sales commissions. The District Court denied Petitioner's Motion finding:

> 1. The claim for commissions could have been raised initially in the case. At the present time the trial is less than a month away and discovery has been completed.
>
> 2. The claim to be added has nothing to do with the wrongful discharge claim.
>
> 3. The plaintiff can obtain relief for this claim in an alternate forum.

(Decision Entry of January 6, 1988, See Appendix A8 to Petition for Writ of Certiorari).

The Federal Rules of Civil Procedure allow amendments to pleadings to be "freely given when justice so requires." Fed. R. Civ. P. 15(a). However, a trial court's decision to grant or deny leave to amend will be overturned only for abuse of discretion. *Guthrie v. J.C. Penney Company, Inc.*, 803 F.2d 202, 210 (5th Cir. 1986). A trial court, in determining whether to allow an amendment, must consider such factors as undue delay in filing the motion, bad faith by the moving party, undue prejudice to the opposing party, and the futility of the amendment. *Podlesnick v. Airborne Express, Inc.*, 94 F.R.D. 288 (S.D. Ohio 1982).

In applying these standards, the District Court did not abuse its discretion in denying Petitioner's leave to amend his Complaint. Although Petitioner filed his original Complaint on March 15, 1985, he did not seek leave to amend his Complaint until January, 1988. Petitioner's additional claim for past due commissions was known to him when he originally filed his lawsuit and was not a product of newly discovered evidence (Trial Court's Entry of January 6, 1988, See Appendix A8). The District Court properly determined that, with the trial just a month away and discovery completed, Respondent would be unduly prejudiced if Petitioner was allowed to amend his Complaint to add a new cause of action.

Generally, to constitute an abuse of discretion, there must be "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir. 1980) citing *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). The District Court weighed the relevant factors and reached a sound conclusion. Certainly the District Court's decision cannot be considered an abuse of discretion.

Moreover, the District Court's denial of Petitioner's Motion for Leave to Amend his Complaint was not properly preserved for appeal either before the Court of Appeals or this Supreme Court. Petitioner appealed to the Court of Appeals from the Judgment Entry of June 28, 1988 which entered summary judgment for Respondent, but did not appeal from the January 6, 1988 Entry denying Petitioner leave to amend his Complaint. For that reason, this Court should not even review this issue at this late date.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Honorable Court to dismiss Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

CHARLES M. ROSENBERG
Counsel of Record

1100 Citizens Building
850 Euclid Avenue
Cleveland, Ohio 44114
(216) 363-4671

Attorney for Respondent
Avis Rent-A-Car System, Inc.

Of Counsel:

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF

(3)

Supreme Court, U.S.
FILED
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No. 88-1966

IN THE

Supreme Court of the United States

October Term, 1989

PATRICK M. ZILL,
Petitioner,

vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

REPLY BRIEF OF PETITIONER

THELMA C. FURRY
50 Munroe Falls Avenue
Munroe Falls, Ohio 44262
(216) 688-4047
Counsel of Record
for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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No. 88-1966

IN THE

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PATRICK M. ZILL,
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vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

REPLY BRIEF OF PETITIONER

A. In reply to Respondent's statement, the law may pertain to an at-will employment, but the case before this Court is not an at-will employment case. Joint Exhibit "A" also marked as Plaintiff's Exhibit 12A is the manual for Respondent's Non-Union Employees.

On November 12, 1987 Judge James L. Graham held an oral hearing on Respondent's Motion for Summary Judgment. We call the Court's attention to the transcript of the hearing on Page 16, Lines 9 through 20:

> "THE COURT: FIRST OF ALL, LET'S FIND OUT IF IT DID APPLY TO HIM, BECAUSE YOUR PRIMARY ARGUMENT WAS THAT THIS WAS A STRAIGHT EMPLOYMENT-AT-WILL

SITUATION. NOW WE HAVE A DOCUMENT THAT MAY VERY WELL CHANGE THAT POSITION. VERY FRANKLY AS I READ THIS DOCUMENT, IT APPEARS TO ME TO BE A POWERFUL ITEM OF EVIDENCE IN THE PLAINTIFF'S FAVOR IN THIS REGARD. I AM NOT PRE-JUDGING THE CASE IN THAT RESPECT, BUT IT SEEMS TO ME THAT THIS KIND OF DETAILED SET OF RULES AND REGULATIONS PARTICULARLY AS THEY APPLY TO TERMINATION OF EMPLOYMENT, MAY VERY WELL MODIFY THE TRADITIONAL-AT-WILL DOCTRINE UNDER BOTH MERS AND THE PHUNG CASES."

Judge Graham overruled Respondent's Motion for Summary Judgment. At this date the evidence that Ohio Bureau of Employment Services found that Respondent was wrongfully discharged. At this time the Court's Civil Docket continuation sheet contained the following filings: Depositions of Joseph Meyer and Patrick Zill; Motion of Defendant for Summary Judgment; Motion of Plaintiff to Supplement Final Trial Order; Motion of Plaintiff to Compel Appearance of Defendant for Deposition; Memorandum of Defendant to Compel Appearance of Defendant for Deposition.

The case was transferred to Judge George Smith December 11, 1987. On June 28, 1988 Judge Smith sustained Respondent's Motion for Summary Judgment.

Respondent requested an oral hearing on the Motion to Reconsider Judge Graham's order, but was refused. The ruling by Judge Smith must have been made through some misapprehension. This is not a case of an at-will employment. The contract in this case is the manual. The two pages, 1 and 5, are part of the manual, and are as follows: Page 1—Employment Processing. The Court will note that under Procedure, Number 1 is the

offer to the candidate; and Page 5, designated as *Sign On*, is a provision for the candidate's signature (See Addendum, p. A2).

The pleadings, affidavits, memorandums, all describe the conference that Petitioner and Respondent's Agent held before Petitioner accepted the job. Petitioner's foremost reason for accepting the job offer by Respondent was because he was led to believe that besides the best benefits known to Petitioner, the fact that he would not be hired and fired without cause was of utmost importance to Petitioner.

Petitioner read the manual and talked about the terms in the manual. Respondent wanted particularly to know why Petitioner would take a job which would pay Petitioner less money than he was at the time making. Petitioner told Respondent that it was because the job was a "protected job", that he was content that it was a protected job until he would be pensioned off.

Petitioner had every reason to rely on the fact that the job was not an at-will job. The manual recited this fact at great length. The advertisement, Respondent's Exhibit 7, was an inducement to sign-up as Respondent's Non-Union-Employee.

The Employment Manual is the written agreement between Respondent and Petitioner. Respondent breached its own Rules and Regulations by "side-stepping" its written regulations in the termination of Petitioner's employment, which are very specific.

The purported written notice was dated March 28, 1984 whereas Petitioner was fired on March 9, 1984. The purported written notice is in accordance with the Rules and Regulations of the manual, and the manual is the Joint Exhibit A, also marked as Plaintiff's Exhibit 12A.

We urge the Court to grant Petitioner the right to a Trial by Jury to determine the issues in the case before the Court.

B. In reply to B, the U.S. Circuit Court comitted error in reversing Judge Graham's Denial of Summary Judgment. There was positively no reason for such reversal. The cited law did not consider the facts in the case before the Court.

The U.S. Circuit Court and the U.S. Court of Appeals failed to consider the fact that Ohio Bureau of Employment Services found that Petitioner was wrongfully discharged.

The Court of Appeals and also the Circuit Court failed to consider that the purported warning notice dated March 28, 1984 is tainted with fraud. Petitioner was fired on the 9th of March, 1984 and was already found by Ohio Bureau of Employment Services to be wrongfully discharged.

For authority we cite the case of *Ardith Mcpherson, plaintiff-appellant v. Walter Rankin,* individually and in his official capacity, case No. 88-2399 United States Court of Appeals Fifth Circuit (July 12, 1984):

> Syl. 7. It is not the district Court's function on a motion for Summary Judgment to resolve any genuine issue of material fact or make determinations as to the credibility of witnesses, but instead Court must consider facts presented and resolve all doubts in light most favorable to the non-moving party.

Judge George Smith and the Court of Appeals totally disregarded this procedure.

We submit that Judge Graham denied motion for Summary Judgment when the fact that Petitioner was found to be wrongfully discharged was not before the Court at that time.

For the Circuit Court and the Court of Appeals to disregard the ruling entirely would not be to the Court's credit.

The fact is that Respondent did not appeal the decision of the Bureau of Employment Services.

> SINCE THAT DETERMINATION WAS APPEALABLE, BOTH ADMINISTRATIVELY AND ULTIMATELY JUDICIALLY, AND RESPONDENT ELECTED NOT TO DO SO, THE PRINCIPLE OF RES JUDICATA APPLIES.

Pullar v. UpjonHealth Care Services, Inc., et al., 21 Ohio App. 3d 298, citing *United States v. Utah Construction Co.*, 384 U.S. 394, at 422 (1966) (listed 2nd page Motion to Reconsider).

The manual, *Avis Non-Union Employees,* was not a guideline; it is a spelled out contract between the employer and employee. Under the manual the employer was active in a dual capacity as employer and as mediator.

Its use of one of the provisions in giving the purported "warning" notice acknowledges the fact that it is a provision for Avis Non-Union Employees, and that such provision is part of the manual.

The case sub judice must be reversed:

Scheuer v. Rhodes, 416 U.S. 232 (40 L. Ed 2d 90)

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

The Supreme Court in *Scheuer* addressed the well-established requirement that when a Motion to Dismiss is filed pursuant to Federal Rules of Civil Procedure, the Trial Court must construe the allegations presented in the complaint "favorably to the pleader" and this is so even when "recovery is very remote and unlikely, but that is not the test".

C. In reply to C, it is a denial of due process for a Trial Court to grant summary judgment, disregarding all the facts in the case before this Court. Petitioner did request an oral hearing as shown by the Index Sheet of the U.S. District Court, which states that Petitioner requested oral hearing, but was denied an oral hearing.

D. In reply to Respondent's Statement D, Page 7 of Respondent's Brief reads as follows:

> "D. This Court Should Not Review the Allegation That Respondent 'Extend(ed) Itself in a Dual Capacity Towards (Petitioner And) Ha(d) a Duty to Perform as Mediator' Because Petitioner Raised That Issue For the First Time in This Petition For Writ of Certiorari."

Statement D is absolutely not true.

I

The first time the Petitioner used the statement was on November 12, 1987 at the oral hearing before Judge Graham and in Petitioner's Memorandum Contra Motion for Summary Judgment. It is as follows:

> "Plaintiff prays the Honorable Court to overrule Defendant's Motion for Summary Judgment for the reason that there are factual issues which should be decided by a Jury. THE CASE SUB JUDICE IS NOT LIKE ANY OTHER CASE; IT IS UNUSUAL IN THAT IT PROTECTS ITS EMPLOYEES MORE THAN A UNION WOULD PROTECT THE EMPLOYEES, EXHIBIT 12 ADVERTISED FOR CAREER-MINDED PERSONS, AS SHOWN BY EXHIBIT B."

II

The second time that Petitioner used the expression was in the pleadings in the U.S. District Court of Appeals, which is as follows:

> "We urge the Court to find that loyalty and confidence are necessary elements in the case before the Court. Appellee is standing in a dual capacity as employer and as a protector of its Non-Union Employees."

III

The third time that Petitioner used the expression is in the U.S. District Court of Appeals; the reply on Page 2 is as follows:

> "The cases cited by Appellee are not in point. In each of the cases, the factual situations were all different. In the case before the Court, the facts are very novel. Appellee acted as the Employer, and also took the place of the Union. One of Appellee's Brochures, on its cover page recited *"AVIS—HIGHLIGHTS OF YOUR BENEFIT PROGRAM—NON UNION EMPLOYEES."*

This Court is bound to give meaning of what Avis meant when it offered itself as the *Mediator between itself and Appellee.*

The writer was well aware for many years that an issue not raised in a lower Court may not be used in the Appellate Courts.

We urge the Court to find that the essence of this case which will be determinative of the relationship between the parties must not be lost. We urge the Court to grant Petitioner the rights he is entitled to under our Constitution.

At the time Appellant was fired, Appellant was a vested employee. We submit that *Appellee acted in a dual capacity with its employees.* The Employees Manual was very specific about the offer to its employees, and the acceptance of the offer. The qualifications of the employee, the opportunity for advancement, and the numerous steps in case of termination, are all outlined in the Employees Manual, as well as the appeal process and the warning process. The method under which warnings were to be exercised are very specifically outlined in the Employees Manual.

Appellant did not receive any warnings until after he was fired. The three letters which Appellee mentions were delivered approximately two weeks after Appellant was fired, and already receiving benefits from the Ohio Bureau of Employment Services. Appellee in not living up to its own rules and regulations shows *bad faith, in its dual capacity.*

In reply to Item II, Page 8 of Respondent's Brief, Judge Smith in the U.S. District Court and the Court of Appeals overlooked the fact that the purported Notice of Warning dated March 28, 1984 is somewhat tainted with fraud. Petitioner was fired on the 8th day of March, 1984, and the Ohio Bureau of Employment Services determined that Petitioner was wrongfully discharged on the 29th of March 1984.

The case that Respondent is citing law on is not the case which is before this Court. The Court of Appeals states:

> "Zill argues here that the employee handbook and the oral comments of Avis' agent created an enforceable binding employment contract. Zill offered, and we can see no evidence of a meeting of

> the minds as to the creation of an employment contract. Thus we see no error in granting summary judgment."

If the Court were to examine Joint Exhibit A also marked as Plaintiff's Exhibit 12A, and sheets Number 1 and 5 which are an offer and acceptance, and examine the affidavits of Petitioner and affidavits of Robert Schmidt, Petitioner's immediate Supervisor, the Court would know that this case should be decided by a Jury. These are the facts that the Jury must decide.

In reply to the reason why the Court committed error in refusing Petitioner to file an Amended Complaint, there were at least four months between the request to amend and the trial date. Respondent knew from the pleadings in the case before this Court, that there was $3,090.00 due in commissions.

That Petitioner learned through the depositions the real reason why Joe Meyers fired Petitioner. The affidavit of Robert Schmidt is attached hereto (Addendum, p. A3) and made a part of the reply as if fully rewritten herein, and made a part of the reply. The affidavit gives the true reason why Petitioner was fired.

Respondent would not be greatly prejudiced by allowing the Amended Complaint to be filed, since all facts are within the knowledge of Respondent.

We urge the Court to grant the Writ of Certiorari.

The District Court committed error in denying Appellant the right to amend his complaint. Civil Rule 15(A) was intended to be liberal in granting litigants, in the interest of justice, the right to amend pleadings.

> *Birmingham Fire and Insurance Co. v. River Downs Race Track* (1985) 26 Ohio App. 3d 139

"Civ. R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party."

Hoover et al., Appellants v. Sumlin, Randolph Township, Appellee, et al. (1984) 12 Ohio St. 3d 1.

'1. A motion for leave to amend a pleading made pursuant to Civ. R. 15(A) should be granted 'freely' when justice so requires."

CONCLUSION

FOR THE REASONS STATED WE URGE THE COURT TO CERTIFY THE WRIT OF CERTIORARI IN THE INTEREST OF JUSTICE.

Respectfully submitted,

THELMA C. FURRY

50 Munroe Falls Avenue
Munroe Falls, Ohio 44262
(216) 688-4047

Attorney for Petitioners

ADDENDUM

EXCERPT FROM AVIS EMPLOYEE'S MANUAL

Page 1:

EMPLOYMENT PROCESSING

POLICY:

The company desires to hire the highest quality employee to fill each position with a minimum of time lost between a position opening and commencement of employment by the new employee.

PROCEDURE:

1. Candidates will be interviewed by manager with the open position.
2. Qualified applicants will be referred to the district manager for additional interviewing.
3. District manager's office will obtain verification information on previous employment of the candidate.
4. If satisfactory past verification is established, the manager will establish the starting wage and date and make an offer to the candidate.

Page 5:

SIGN ON

POLICY:

Sign on will indicate to each new employee that the company wishes them to have as much information and knowledge as possible.

Signing on includes:

1. Completing bonding application.
2. Enrollment in insurance programs.
3. Completing job verification forms.
4. Complete withholding statement (W-4).
5. Starting wage and date confirmation.
6. Receives time card (if applicable).
7. Employee receives identification card.

AFFIDAVIT OF ROBERT SCHMIDT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Number: C2-85-691

PATRICK M. ZILL,
Plaintiff,

vs.

AVIS RENT A CAR SYSTEM, INC.,
Defendant.

AFFIDAVIT OF ROBERT SCHMIDT

Robert C. Schmidt, after first being duly sworn, deposes and says that the following statement is true.

In March of 1984, Joe Myer came to my office. He asked me what Mr. Zill's weakest ability was in sales. I told him I thought he was one of the best salesmen in the City, and didn't have any. He then inquired about his sale's orders and paper work.

I told him that all the top salesmen I knew always were a little sloppy on paper work, but their sales more than made up for it.

He then told me he wanted Pat fired and wanted me to do it. I told him I had no reason to fire him, and that he would have to do it. At least twice and maybe more, he referred to Pat as "an old man", and asked me what I wanted an old man like that working for me.

/s/ ROBERT C. SCHMIDT
ROBERT C. SCHMIDT

Sworn to, and subscribed before me this 5 day of Nov. 1987.

/s/ LEDA M. C. HARTWELL
LEDA M. C. HARTWELL
LEDA C. HARTWELL
Attorney-at-Law
Notary Public—State of Ohio
My commission has no expiration date
Section 147.03 R.C.